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County Court of New York, Westchester County: People v. Days

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COUNTY COURT OF NEW YORK
WESTCHESTER COUNTY

People v. Days[1]
(decided December 31, 2009)

Three years subsequent to his conviction for a double homicide, the defendant, Selwyn Days, moved to vacate the judgment under Criminal Procedure Law section 440.10(1)(h)[2] due to his defense counsel's failure to complete an adequate investigation of possible alibi witnesses and proffer a plausible alibi defense to the jury.[3] The defendant alleged that he was divested of his right to the effective assistance of counsel under the Sixth Amendment[4] to the Federal Constitution, and article I, section 6[5] of the New York State Constitution.[6] During the evidentiary hearing, the defendant proffered the testimony of several witnesses, all of whom failed to put the defendant at the scene of the crime, and none of whom the defense attorney chose to adequately investigate.[7] According to the court, failure to adequately investigate those parties and the facts surrounding their testimony, deprived the defendant of a plausible

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[1] No. 0469/01, 2009 WL 5191433 (N.Y. Cnty. Ct. Dec. 31, 2009).

[2] *Id.* at *1; N.Y. CRIM. PROC. LAW § 440.10(1)(h) (Consol. 2010) states in relevant part: "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States."

[3] *Days*, 2009 WL 5191433, at *2.

[4] The Sixth Amendment to the United States Constitution states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence [sic]."

[5] Article I, section 6 of the New York Constitution states, in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."

[6] *Days*, 2009 WL 5191433, at *1.

[7] *Id.* at *2.

alibi defense.[8] As a result, the court held that the defendant was not provided with the effective assistance of counsel as afforded by both the Federal and New York State Constitutions.[9] The judgment was vacated accordingly and a new trial was ordered.[10]

On November 21, 1996, the bodies of Archie Harris and Betty Ramcharan were discovered in Harris's home in Eastchester.[11]

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[8] *Id.* at *8.

[9] *Id.* at *9.

[10] *Id.* The defendant also made a section 440.10(1)(g) motion to vacate the judgment which was denied because the "newly discovered DNA test results [were] of such character as to create a probability that had such evidence been received at trial, the verdict would have been more favorable to the defendant." *Days*, 2009 WL 5191433, at *12. Section 440.10(1)(g) states in relevant part:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: . . . [n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence[.]

N.Y. CRIM. PROC. LAW § 440.10(1)(g) (Consol. 2010). Despite the power of DNA to "convict the guilty and exonerate the innocent," the court reasoned that the DNA results involved in the current case did not possess enough forensic value to exonerate the defendant on the section 440.10(1)(g) claim. *Days*, 2009 WL 5191433, at *11-12. The court opined that, collectively, the defendant's alleged confession to the murder as well as his admissions of his motive (which was to vindicate the sexual assault of his mother by the decedent, Archie Harris) in conjunction with other corroborating statements made by the defendant, was indicative of his guilt. *Id.* at *12. Furthermore, the court asserted that a vacation of the judgment under this statute was not due the defendant because the jury was fully aware that there was no forensic evidence linking the defendant to the crime. *Id.* The court also denied the defendant's motion to vacate the judgment and dismiss the indictment based on his contention that the newly discovered DNA and alibi evidence, whether reviewed collectively or individually, proved his actual innocence required by Criminal Procedure Law section 440.10(1)(h). *Id.* The court recognized that even though there was no express judicial holding that suggested that a defendant can raise a "free-standing claim of actual innocence . . . under § 440.10(1)(h) . . . virtually all of the trial courts [that have] explicitly address[ed] the issue have concluded that such a claim may be raised." *Id.* at *13. "Nevertheless where recognized, a defendant must, in order to establish actual innocence, demonstrate by clear and convincing evidence that he is in fact actually innocent of the crimes of which he was convicted." *Days*, 2009 WL 5191433, at *13. The court acknowledged that although the alibi witnesses were credible, their testimony was not devoid of inconsistencies. *Id.* Moreover, as the court discussed previously, the DNA had limited value as to its effects on actually changing the outcome of the case. *Id.* at *14. Accordingly, the defendant's motion was denied. *Id.*

[11] *Id.* at *1.

Harris was "beaten, bludgeoned and stabbed to death," and Ramcharan "had been strangled and suffocated and her throat had been slit."[12] The alleged murder weapon, a bloody knife, was found near Ramcharan's body.[13] On February 16, 2001, Days was arrested for the murders.[14] On April 16, 2004, he was sentenced to two consecutive sentences of twenty-five years to life in prison—one sentence for each count of second degree murder.[15]

The court granted a hearing in response to the defendant's August 2007 motion to vacate the judgment on his federal and state constitutional claims.[16] At his hearing, the court heard the testimony of Christopher Chan, the defendant's former trial attorney, and four alibi witnesses.[17] With the exception of Mr. Chan, the testimony of the four alibi witnesses collectively asserted that the defendant was in Goldsboro, North Carolina at the time the murders were committed.[18]

McIver, a magistrate of twenty-two years, testified that she saw the defendant and his mother, Stella Days, at her request, a day prior to a warrant being issued for an incident which occurred earlier that day.[19] She also recalled seeing the defendant the day the warrant was issued.[20] McIver averred, pursuant to a criminal process update generated from the clerk's office, that the incident occurred on November 20, 1996, and that she issued the warrant on the following day, November 21, 1996.[21] On September 2, 2003, per the request of Ms. Days, McIver allegedly forwarded a letter to Mr. Chan on a blank piece of paper containing no letterhead informing him that though she could not recall the month or date, the defendant was in

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[12] *Days*, 2009 WL 5191433, at *1.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] The witnesses were all residents of North Carolina, including: Remona McIver, Magistrate; Donald Evans, a restaurant owner; Cindy Artis, now known as Cindy Ramona Dawson, the defendant's former girlfriend; and Perry Sharp, a retired captain of the Goldsboro, North Carolina Police Department. *Days*, 2009 WL 5191433, at *1. Donald Evans, Kevin MacLaren, Sandra Thomas, Elaine Schwartz, and Robert Adamo also testified at the hearing even though their testimonies were not discussed in the case. *Id.* at *1.

[18] *See id.* at *2 n.1 (discussing that the murders occurred between November 19, 1996 and November 21, 1996).

[19] *Id.* at *2.

[20] *Id.*

[21] *Days*, 2009 WL 5191433, at *2.

her office during the latter part of 1996.[22] Initially, she testified that she did not look at the clerk's records before she wrote the letter.[23] However, she modified her testimony and later asserted that although she did not print them out, she reviewed the records prior to writing the letter to "refresh her memory."[24]

In Chan's testimony, he indicated that he did not have a clear recollection of speaking to McIver.[25] However, during a conversation with Investigator Grimes, which was surreptitiously taped by Ms. Days, Chan asserted that he believed the September letter to be a forgery as it was not on judicial stationary, was not properly addressed, and was vague with respect to the date and time the defendant was in her office.[26] When Chan reviewed the letter at the hearing, he again confirmed that the letter looked suspicious and "was not self-authenticating," as it contained no "telephone number and letterhead of any kind[; thus suggesting,] it could [have] be[en] generated on almost any computer."[27]

Similar to McIver, Sharp also testified to encountering the defendant in Goldsboro in November 1996 when he responded to a dispute at the Days residence.[28] Despite Perry Sharp's inability to recollect the exact date the dispute occurred, or whether the defendant was living in Goldsboro during the entire month of November 1996, he was certain that the defendant answered the door when he arrived at the residence, and that the incident occurred a few days before Thanksgiving.[29] Again, at the request of Ms. Days, Sharp contacted Chan and allegedly spoke to him for one-half hour.[30] Nevertheless, at trial, Chan could not recall the specifics of their conversation.[31]

The defendant and his former girlfriend, Dawson, began dating in September 1996 and were dating for approximately one and

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at *6.

[26] *Days*, 2009 WL 5191433, at *6. Investigator Grimes was a North Carolina investigator that Stella Days hired in connection with the case. *Id.*

[27] *Id.*

[28] *Id.* at *3.

[29] *Id.*

[30] *Days*, 2009 WL 5191433, at *3.

[31] *Id.* at *6.

one-half months.[32] Dawson confidently asserted that she spoke to the defendant daily and that she " 'probably saw' the defendant everyday while they were dating."[33] However, they saw less of each other after a dispute between Dawson and Ms. Days, which occurred sometime in November 1996.[34] Even though Dawson testified to seeing the defendant after the confrontation, the two were no longer dating and communicated mostly by phone.[35] Dawson was called upon by Ms. Days to proffer a sworn affidavit stating that she lived at the Days residence even though, according to Dawson, she did not.[36] Yet, despite Dawson's refusal to do so, she continued to maintain during her testimony that she saw the defendant every day during the month of November 1996.[37]

The last alibi witness, Evans, a restaurant owner in Goldsboro, testified that during the month of November 1996, the defendant ran a tab at his restaurant while Ms. Days was out of town.[38] He further alleged that he saw the defendant on a Friday in November at the Days yard sale and the following Tuesday when the defendant accompanied him to his house to deliver his purchases.[39] Initially, prior to consulting his calendar, Evans said the date of purchase was November 1st and the date of delivery was November 5th.[40] However, upon later review of his calendar, Evans modified his testimony to assert that the purchase took place on November 15th and the delivery occurred on November 19th.[41]

At the request of Ms. Days, Evans contacted Chan twice and supposedly spoke to him each time.[42] Chan's alleged disinterest in Evans's alibi caused Evans to forward an executed letter to Chan, that he himself did not write, in which he alleged that he saw the defendant daily during the month of November 1996.[43] However,

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[32] *Id.* at *3.
[33] *Id.*
[34] *Id.*
[35] *Days*, 2009 WL 5191433, at *3.
[36] *Id.* at *4.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Days*, 2009 WL 5191433, at *4.
[41] *Id.*
[42] *Id.*
[43] *Id.*

subsequent to consulting his calendar, Evans realized that he was travelling on the alleged dates of the yard sale and furniture delivery, thus confirming that the letter and the dates were both inaccurate.[44] During Chan's testimony, Chan asserted that he had no recollection of having any conversations with Evans.[45]

With the exception of the defendant's confession and alleged additional admissions of guilt that he himself made, Chan argued, at the first trial, that there was not enough evidence to meet the burden of proof.[46] Even though Chan attempted to assert that a third party committed the murders, the jury rejected his theory.[47] Accordingly, the defendant's first trial resulted in a mistrial.[48] At the second trial, Chan predominantly argued a murder suicide theory which suggested that Ramcharan killed Harris and then killed herself.[49] In addition to this defense being looked upon unfavorably by the jury, an unfavorable verdict—a conviction—was returned for the defendant.[50]

Chan's testimony revealed that as of March 2003, he was aware of a possible alibi defense.[51] Moreover, on March 24, 2003, he forwarded correspondence to the prosecution regarding possible alibi witnesses.[52] Yet, Chan did not employ the assistance of an investigator, thus resulting in none of the potential alibi witnesses being interviewed.[53] A financial dispute between Chan and Ms. Days further prevented the interview of potential alibi witnesses.[54] According to Chan, he did not drive down to North Carolina to interview the alibi witnesses because Ms. Days refused to give him gas money.[55] Following this incident, Chan petitioned the court on two occasions to be removed as counsel.[56] Despite his contention that he would be incompetent to represent the defendant, the court

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[44] *Id.* at *4-5.
[45] *Days*, 2009 WL 5191433, at *6.
[46] *Id.* at *5.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Days*, 2009 WL 5191433, at *1.
[51] *Id.* at *6.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Days*, 2009 WL 5191433, at *6.
[56] *Id.*

denied both of his applications.[57]

During the evidentiary hearing, Chan maintained that an argument of actual innocence was the defense that the case required, hence why he adamantly argued that there was no forensic evidence linking the defendant to the crime scene.[58] According to Chan, the decision to present an alibi witness was a "strategic decision," and should that presentment be "effective, [it] had to be complete."[59] Moreover, as Chan was aware that the prosecution's argument was premised on the fact that the defendant killed Harris to vindicate his mother, due to Harris's alleged sexual assault of her, he precluded Sharp's testimony in order to prevent Ms. Days from becoming a focal part of the case.[60]

Prior to the court's analysis, as pursuant to New York State jurisprudence, the court first recognized that both the Federal and New York State Constitutions afford its citizens the right to the effective assistance of counsel.[61] According to federal jurisprudence, as set forth in *Strickland v. Washington*,[62] a "defendant must show that [his] counsel's performance was deficient . . . [and] that the

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[57] *Id.*

[58] *Id.* at *7. Based on the Westchester lab report tests, Chan knew that there was no evidence linking the defendant to the crime. *Id.* at *5. In addition, reports from both the FBI and Eastchester County revealed that the DNA which was found belonged to more than one individual. *Days*, 2009 WL 5191433, at *5. Yet, at the evidentiary hearing Chan could not assert whether: (1) he possessed this knowledge prior to the first and second trial; or (2) if he even looked at the reports containing this information. *Id.* The court opined that Chan's inaction resulted in his failure to employ the services of a DNA expert to confirm or disaffirm the DNA findings. *Id.* Ironically, he actually asserted that his defense strategy would not have changed even if he would have been provided with an FBI report which stated another person was present at the crime scene. *Id.* According to Chan, it simply would have been an additional argument. *Id.*

[59] *Days*, 2009 WL 5191433, at *7. Chan asserted that he did not receive any reliable information in support of an alibi defense. *Id.* Stella Days gave Chan taped testimony of six alibi witnesses; none of which testified at this trial. *Id.* at *6. Mr. Chan did not introduce the testimonies into evidence because he "heard Stella Days speaking in a stage whisper and putting words into the witnesses' mouths." *Id.* The tape could not be produced at the hearing because, despite Chan's assertion that he gave it to the appellate counsel, it could not be located in their files. *Id.* at n.2.

[60] *Days*, 2009 WL 5191433, at *7. Sharp testified that Ms. Days was selling jewelry in North Carolina. *Id.* Chan reasoned that the jury would use this to link the defendant to the murder, as Ms. Days was not wealthy, and reportedly some items were missing from Harris' residence. *Id.*

[61] *Id.*

[62] 466 U.S. 668 (1984).

deficient performance prejudiced the defense."[63] Yet, New York jurisprudence asserts that a defendant prevails on an ineffective assistance of counsel claim when he "demonstrate[s] that his attorney failed to provide meaningful representation."[64] The court opined that prejudice, albeit essential, is not a dispositive element by which the New York courts, unlike the federal courts, determine whether an attorney has provided effective assistance.[65] Instead, it is only a factor taken into consideration when determining whether the defendant was afforded fairness of the legal process.[66]

In keeping with precedent, the court acknowledged that as a matter of trial strategy, a defense attorney should have, and does have, the flexibility to employ certain defenses more steadfastly than others, absent the scrutiny of the court.[67] Yet, despite the court's acknowledgment of this, Chan's failure to proffer an alibi defense was not considered an effective trial strategy.[68] The court asserted, pursuant to the reasoning of *People v. Fogle*,[69] that Chan's failure to adequately investigate the defendant's alibi witnesses was actually a "fundamental . . . deprivation of [his right to] the effective assistance of counsel."[70] Moreover, the court asserted that a "defendant's right to representation . . . entitle[s] him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and allow himself time for reflection and preparation for trial."[71]

Although all of the witnesses were available to Chan prior to the trial, with the exception of one, Chan did not adequately investigate any of them.[72] Neither did he exercise any measures to determine the authenticity of the magistrate's correspondence, the origin of the jewelry, nor the validity of the purported alibi testimony on the tape proffered by the defendant's mother.[73] According to the

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[63] *Id.* at 687.
[64] People v. Caban, 833 N.E.2d 213, 219 (N.Y. 2005).
[65] *Id.* at 222.
[66] *Id.*
[67] People v. Bussey, 775 N.Y.S.2d 364, 366 (App. Div. 2d Dep't 2004).
[68] *Days*, 2009 WL 5191433, at *8.
[69] 762 N.Y.S.2d 104, 106 n.1 (App. Div. 2d Dep't 2003).
[70] *Days*, 2009 WL 5191433, at *7.
[71] *Id.* (quoting *Bussey*, 775 N.Y.S.2d at 366) (internal quotation marks omitted).
[72] *Id.* at *8.
[73] *Id.*

court, Chan's inaction to seek out potential alibi witnesses, adequately review the DNA reports, and present evidence to the jury about the third party DNA found on the murder weapon, served to "highlight [his] incompetency at trial."[74] The court further opined that Chan's incompetency caused him to proffer an implausible defense to the jury which resulted in a prejudicial and unfavorable decision being rendered for the defendant.[75] Employing the reasoning of *People v. Caban*,[76] the court not only determined that Chan's behavior was deficient, but that it extremely prejudiced the defendant.[77] Accordingly, the defendant's section 440.10(h) motion was granted.

The Sixth Amendment right to effective assistance of counsel is a constitutional entitlement that ensures a defendant's right to a fair and just trial. *Powell v. Alabama*[78] was one of the first cases in which the Court proclaimed that the Sixth Amendment right to counsel was a cherished and recognized right.[79] Nevertheless, *Strickland* bore the standard by which a defense counsel's practices must be measured and met in order to be deemed "ineffective."[80] First, the *Strickland* standard requires the defendant to prove that his counsel's deficient performance fell below the performance of a reasonably competent attorney.[81] Secondly, the defendant must prove that the deficiency in performance prejudiced him in such a serious way that it divested him of a fair trial, thus resulting in the defense counsel being the "but for" cause of the defendant's unfavorable verdict.[82]

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[74] *Id.* at *8-9.

[75] *Days*, 2009 WL 5191433, at *9.

[76] 833 N.E.2d 213.

[77] *Days*, 2009 WL 5191433, at *9.

[78] 287 U.S. 45 (1932).

[79] *Id.* at 64-66. Originally, the English common law did not provide counsel to a defendant charged with a felony crime, except in very limited circumstances. *Id.* at 60. This rule was strictly adhered to until 1836, when it was then abolished by an act of Parliament which extended the aid of counsel to those accused of committing felonious crimes. *Id.* Despite the adoption of much of the English common law by the thirteen colonies, they did not adopt this particular rule. *Id.* at 61. Alternatively, the colonies codified a defendant's right to counsel in their state constitutions, prior to the codification of the right in our Federal Constitution. *Powell*, 287 U.S. at 61-65.

[80] *Strickland*, 466 U.S. at 687.

[81] *Id.*

[82] *Id.* at 694.

"Judicial scrutiny of [a defense] counsel's performance must be highly deferential."[83] If this were not the case, there would be an overwhelming number of requests to overturn convictions on the basis of ineffective assistance of counsel.[84] Omissions or actions by counsel, which can be deemed thorough trial strategy will not be scrutinized in a way that would result in the practice being considered "ineffective assistance."[85] "Moreover, when a [defendant] challenges matters of trial strategy, such as the decision not to call a witness, even greater deference is generally warranted . . . ."[86] An exemplification of this type of judicial deference was afforded to the defense counsel in *Ryan v. Rivera*,[87] where the court refuted the defendant's contention that his attorney's failure to adequately investigate and call his alibi witnesses to testify at trial divested him of his Sixth Amendment rights.[88]

Contrary to Ryan's belief that the testimony of his two alibi witnesses would exculpate him from his present vehicular assault conviction, his trial attorney did not introduce the testimony.[89] Upon the defense attorney's assessment of Ryan's statements, the police reports obtained by discovery, and Ryan's request to ascertain statements of his alibi witnesses, he determined that the alibi witnesses were not credible and that their testimony would be potentially detrimental to the defendant if proffered at trial.[90] Although the court did acknowledge that there were some circumstances in which the failure to investigate and interview a potential alibi witness may prove detrimental to a defendant's case,[91] it recognized that if a defendant gave counsel "reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be

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[83] *Id.* at 689.

[84] *Id.* at 690.

[85] *See, e.g.*, Rosario v. Ercole, 601 F.3d 118, 130 (2d Cir. 2010).

[86] Ryan v. Rivera, No. 00-2153, 2001 WL 1203391, at *1 (2d Cir. 2001). See also *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998), in which the court asserted that "an appellate court on a cold record should not second-guess . . . decisions [of a defense attorney] unless there is no strategic or tactical justification for the course taken."

[87] 2001 WL 1203391.

[88] *Id.* at *2.

[89] *Id.* at *1-2.

[90] *Id.* at *2.

[91] *See id.* (citing Pavel v. Hollins, 261 F.3d 210, 220-22 (2d Cir. 2001).

challenged as unreasonable."[92]

A defense attorney is not automatically deemed to have rendered ineffective assistance of counsel solely for his failure to interview a possible alibi witness.[93] In order for the *Strickland* standard to be satisfied, the testimony must have been able to either exculpate the defendant or strengthen his case.[94] The Sixth Circuit held, in *Avery v. Prelesnick*,[95] that the defense counsel's failure to adequately investigate the defendant's alibi witnesses rendered his assistance deficient and prejudicial to the defendant as there was a reasonable probability that the alibi testimony would have exculpated the defendant.[96]

Defendant Avery provided his attorney with the name of several alibi witnesses, one of which the attorney investigated.[97] During the investigation, the attorney's investigator was alerted to another alibi witness, whom he neither requested contact information for nor tried to contact.[98] Neither the investigator nor the defense attorney followed up with this alibi witness, a teenager at the time, as they were allegedly depending on him to contact them.[99] The court opined that the behavior evinced by counsel was not that of a "seasoned attorney," and instead fell below the requisite standard of reasonableness.[100] Moreover, such behavior was prejudicial to Avery, as his conviction was mainly premised on the testimony of a weak eyewitness.[101] Consequently, the court held that the assistance of counsel rendered was ineffective because the jury was devoid of hearing testimony that may have actually supplied it with a reasonable doubt.[102]

A defense attorney does not have to present an alibi defense if at the completion of an investigation he can determine that the alibi

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92 *Rivera*, 2001 WL 1203391, at *2 (citing *Strickland*, 466 U.S. at 691).

93 *Id.*

94 Bigelow v. Charles, No. 86 CV 1487, 1986 WL 15363, at *2 (E.D.N.Y. 1986).

95 548 F.3d 434 (6th Cir. 2008).

96 *Id.* at 437-39.

97 *Id.* at 437.

98 *Id.* at 438.

99 *Id.*

100 *Avery*, 548 F.3d at 438.

101 *Id.* at 439.

102 *Id.*

witness may provide a weak defense at trial.[103] An attorney is not obliged to present an alibi defense if it would result in a vigorous cross-examination of the witnesses, which would in turn permit the prosecution to proclaim the defendant's alibi as weak.[104] A trial strategy of this kind would only prove detrimental to the defendant.

Alternatively, " 'omissions [that] cannot be explained convincingly as resulting from a sound trial strategy, but instead ar[i]se from oversight, carelessness, ineptitude, or laziness,' may fall beyond the constitutional minimum standard of effectiveness."[105] In *Rosario v. Ercole*,[106] the Second Circuit opined that the defendant's counsel evinced these very characteristics when she failed to investigate the defendant's alibi witnesses in Florida.[107] Defendant Rosario, who was charged and convicted of second degree murder, provided his attorney with a list of alibi witnesses who could corroborate that he was in Florida during the time the murder occurred.[108] Even though the defense attorney's application to cover the travel expense of the investigator was approved by the court, she failed to relay this information to the investigator.[109] As a result, the investigator assumed the application was never approved and the investigation was never completed.[110] The court adamantly proclaimed that the behavior she evinced was clearly deficient and, moreover, prejudicial to the defendant thus satisfying the *Strickland* standard.[111]

In contrast to the federal standard, the New York standard that governs the ineffective assistance of counsel, as set forth in *People v.*

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[103] Brownridge v. Miller, No. 06-CV-6777 (RJD)(SMG), 2010 WL 2816265 (E.D.N.Y. 2010). *See* Matthews v. Mazzura, No. 04-0528, 2005 WL 195089, at *1-2 (2d Cir. 2005) (holding that the exclusion of alibi testimony did not constitute ineffective assistance of counsel when the alibi witness was not able to give a full account of the defendant's whereabouts on the day of the robbery in question); *see also* Allah v. Kelly, 32 F. Supp. 2d 592, 600 (W.D.N.Y. 1998) (holding that exclusion of alibi testimony did not constitute ineffective assistance of counsel when the alibi witness' testimony was not strong enough to rebut the testimony of an eye witness).

[104] *Brownridge*, 2010 WL 2816265, at *14.

[105] *Rosario*, 601 F.3d at 130 (quoting Wilson v. Mazzuca, 570 F.3d 490, 502 (2nd Cir. 2009)) (internal citations omitted).

[106] 601 F.3d 118.

[107] *Id.* at 130.

[108] *Id.* at 120.

[109] *Id.* at 130.

[110] *Id.*

[111] *Rosario*, 601 F.3d at 131.

Baldi,[112] is more flexible.[113] The New York standard was developed prior to the adoption of the *Strickland* standard and its use was reaffirmed in *People v. Benevento*.[114] The New York courts have held that "so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met."[115] Furthermore, it is incumbent on the defendant to prove that his legal representation lacked tact and strategy and thus resulted in an unfavorable verdict.[116]

In New York, counsel has been deemed to be ineffective when it was found that he "embarked on an inexplicably prejudicial course."[117] Nevertheless, prejudice is not a dispositive factor as it neither determines nor governs the outcome of the case.[118] Instead, it is an essential factor, viewed amongst several factors, in determining whether a defendant has actually received meaningful representation.[119]

According to *People v. Sieber*[120] and *People v. McDonald*,[121] an attorney has rendered meaningful representation when he has: "adequately prepared for trial"; "vigorously cross-examined prosecution witnesses"; "made appropriate objections"; and "gave an effective summation pointing out the weaknesses in the People's case."[122] In *McDonald*, the court opined that the defendant failed to show that his attorney's decision to forego the defendant's alibi defense was neither strategic nor tactical.[123] Furthermore, the court asserted that defense counsel's decision to pursue a misidentification claim, as opposed to an alibi defense, together with his performance during trial constituted meaningful representation even though an

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[112] 429 N.E.2d 400 (N.Y. 1981).

[113] People v. Benevento, 697 N.E.2d 584, 587 (N.Y. 1998).

[114] *Id.* at 589.

[115] *Id.* at 587 (internal quotation marks omitted) (quoting *Baldi*, 429 N.E.2d at 405).

[116] *Id.*

[117] People v. Zaborski, 452 N.E.2d 1255, 1256 (N.Y. 1983).

[118] *Benevento*, 697 N.E.2d at 588.

[119] *Id.*

[120] People v. Sieber, 809 N.Y.S.2d 613 (App. Div. 3d Dep't 2006).

[121] People v. McDonald, 681 N.Y.S.2d 112 (App. Div. 3d Dep't 1998).

[122] *See id.* at 114; *see also Sieber*, 809 N.Y.S.2d at 616.

[123] *McDonald*, 681 N.Y.S.2d at 113.

unfavorable verdict was rendered on behalf of the defendant.[124]

Notwithstanding the slightly different rules governing both the federal and state standards, a similarity does exist in the deference that is applied to an attorney's trial strategy. A "reasonable and legitimate strategy under the circumstances" that may yield an unsuccessful result does not mean that an attorney has provided ineffective assistance of counsel.[125] Furthermore, ineffective assistance of counsel is not to be confused with "mere losing tactics and according undue significance to retrospective analysis."[126]

In New York jurisprudence, failure to provide an alibi defense may constitute the ineffective assistance of counsel.[127] Nevertheless, the defendant must show that the defense was viable.[128] Should the defense attorney decide that the testimony of alibi witnesses is "confused, contradictory, implausible and [can be] largely refuted," it is within his discretion whether or not to present an alibi defense.[129] In as much as an alibi witness may seem beneficial to the defendant, an attorney is not obliged to raise an alibi defense that he believes to be weak, suspicious, and has the propensity to be deemed non-credible on cross-examination by the prosecution.[130] Nevertheless, should counsel fail to employ a proper investigative strategy, which results in the jury not hearing alibi testimony that could actually exonerate the defendant of his claims, counsel is said to have rendered ineffective assistance.[131] This is premised on the theory that a defendant's right to counsel, additionally, mandates his attorney to conduct appropriate investigations so that he may develop cogent and coherent legal defenses to exonerate the defendant at trial.[132]

The Due Process Clause of the Constitution entitles all

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[124] *Id.*

[125] *Benevento*, 697 N.E.2d at 587.

[126] *Baldi*, 429 N.E.2d at 405.

[127] *See Sieber*, 809 N.Y.S.2d at 615.

[128] People v. Jean-Marie, No. 3931/02, 2006 WL 1159911, at *4 (N.Y. Sup. Ct. 2006).

[129] *Id.*

[130] People v. De La Cruz, No. 1311/89, 2006 WL 759682, at *14, *17 (N.Y. Sup. Ct. 2006).

[131] *See, e.g.*, *Bussey*, 775 N.Y.S.2d at 365-66 (holding that the defense counsel's meeting with the defendant two days prior to trial, and his failure to investigate the seven alibi witnesses he learned about during that meeting, was not effective trial strategy but an ineffective assistance of counsel).

[132] *Id.* at 366.

persons to a fair trial.[133] Nevertheless, the Sixth Amendment contains many of the provisions that effectuate this entitlement—one of them being the right for a defendant to have effective assistance of counsel.[134] "A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."[135] The right to counsel plays an instrumental part in our adversarial system. Absent an attorney's knowledge and expertise, it is highly unlikely that a defendant would receive the fair trial that he is entitled to by the Constitution. Therefore, it is not only imperative that attorneys abide by their duty to counsel and represent their clients effectively, it is imperative that the courts effectively apply jurisprudence when trying to determine whether this duty was met.

Early in its analysis, the court in *Days* qualified prejudice as the dispositive element that distinguishes the federal standard from that of New York.[136] Moreover, the court implied that should the federal standard be satisfied, the New York standard is also satisfied.[137] As a result, the defendant was deemed to have met his burden, as required by the New York standard, by virtue of supposedly meeting his burden under the federal standard.[138] Ironically, the defendant did not meet his burden under the federal standard. Despite Chan's failure to provide meaningful representation, his failure to present an alibi defense was not the reason the defendant was convicted of murder. Therefore, the court erred in its analysis under the federal standard.

It is without doubt that Chan's deficient and derelict performance did not constitute meaningful representation and thus satisfied the New York standard regarding ineffective assistance of counsel. Yet, this deficiency only successfully satisfied the first prong of the federal standard. *Strickland* states that in order for the mandatory requirement of prejudice to be satisfied, and the test to be met in its entirety, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors,

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[133] *See* U.S. CONST. amend. XIV, § 1.

[134] *See* U.S. CONST. amend. VI.

[135] *Strickland*, 466 U.S. at 685.

[136] *Days*, 2009 WL 5191433, at *7.

[137] *Id.* at *9.

[138] *Id.*

the result of the proceeding would have been different."[139] Oddly, the court seemed to dismiss the second part of the analysis when they deemed the federal standard met.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome."[140] Chan's performance, or lack thereof, though professionally unreasonable, did not prejudice the defendant. The court acknowledged that "the defendant's admissions to Cherilyn Mayhew [was] powerful evidence of the defendant's guilt."[141] The court further acknowledged that the defendant's motive for killing the decedents—to avenge the sexual assault of his mother which occurred just a few months before the murders—was apparent.[142] Lastly, the court acknowledged that though the alibi witnesses were credible, their testimony did not go without reproach.[143] If all of these circumstances were actually viewed in totality, there is no way the court could have realistically deemed that the defendant was prejudiced, and thus met his burden under the *Strickland* standard.

The federal standard requires the counsel to be the "but for" cause of the defendant's unfavorable verdict, not the concurrent cause.[144] It is extremely unlikely that an alibi defense, consisting of the four witnesses in question, would have refuted the defendant's motive, actual location at the time of the murders, and his self-incriminating testimony. Therefore, Chan's failure to proffer an alibi defense did not satisfy the requisite standard, as set forth by *Strickland*, because it was not the "but for" cause of the defendant's unfavorable verdict.

The testimony of the defendant's alibi witnesses lacked transparency, consistency, and materiality. Yet, despite the court's recognition of these truths, the court still deemed the alibi witnesses credible—credibility that they were solely afforded based on their socio-economic status.[145] At the onset of the proceedings, none of

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[139] *Strickland*, 446 U.S. at 694.

[140] *Id.*

[141] *Days*, 2009 WL 5191433, at *12.

[142] *Id.*

[143] *Id.* at *13.

[144] *Strickland*, 466 U.S. at 694.

[145] *See Days*, 2009 WL 5191433, at *8 ("[A]libi witnesses . . . included otherwise prominent citizens: a magistrate, police officer and local businessman.").

the alibi witnesses provided specific dates or times of their interaction with the defendant.[146] Instead, their testimony actually developed throughout the duration of the case. Ironically, even if Chan would have adequately investigated the witnesses and gathered all the testimony which was ascertained at the evidentiary hearing, there is still no guarantee that he would have proffered an alibi defense. If the alibis could proffer inconsistent, immaterial, and opaque testimony under oath, one may reasonably infer that they have a higher propensity to do so absent the scrutiny of the court. Therefore, even if Chan would have actually conducted adequate investigations of these "prominent citizens,"[147] their weak testimony together with the discretion that Chan is afforded by law could have, and more than likely would have, resulted in him foregoing an alibi defense as a matter of trial strategy. Federal and New York State jurisprudence both afford Chan the discretionary right to forego an alibi defense should he feel that the prosecution would vigorously cross-examine the witnesses, and hence eradicate the alibi defense in its entirety.[148] That entitlement alone justifies Chan in foregoing an alibi defense, especially since all of the alibi's testimonies, with the minor exception of Sharp, were questionable.[149]

The court failed to recognize that whether Chan investigated the alibis or not, his trial strategy would have more than likely remained the same—no alibi defense. Even though his failure to investigate the alibis divested Days of the meaningful representation he is entitled to, this failure together with his decision to forego an alibi defense did not prejudice him. The evidence did. As a result, the court in *Days* erred in holding that Chan rendered ineffective assistance of counsel to the defendant pursuant to the *Strickland* standard.

The *Strickland* standard, in contrast to the New York standard, is much stricter. And because of this strict standard, New

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[146] *Id.* at *13.

[147] *Id.* at *8.

[148] *See Brownridge*, 2010 WL 2816265, at *14 (discussing that if the defense attorney can ascertain from the investigation of the witnesses that they provide weak defenses that would be not be beneficial to the defendant, they do not have to present an alibi defense).

[149] *See, e.g.*, *Days*, 2009 WL 5191433, at *2 (discussing that the Magistrate clarified her testimony to assert that she did review the documents, even though she did not print them to "refresh her memory"); *see also id.* at *5 (revealing that Evans' calendar keeping practices have proven to be at "minimum, inconsistent").

York courts should afford greater scrutiny to the facts and circumstances of the case when applying it. Therefore, the same veracity and attention that the *Strickland* standard requires, and that is applied in the federal courts, should likewise be applied in the New York state courts. Unfortunately, Westchester County Court failed to do so.

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